IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 413 and 418

NORTH CAROLINA,

Petitioner,

—v.—

CLIFTON PEARCE,

Respondent.

CURTIS SIMPSON,

Petitioner,

—v.—

WILLIAM RICE,

Respondent.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

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Motion for Leave to File a Brief as *Amici Curiae**

The American Civil Liberties Union and the American Civil Liberties Union of North Carolina respectfully move for leave to file a brief as *amici curiae* in these cases.

The interest of the American Civil Liberties Union is twofold: the general interest it holds as a civil liberties organization, and, more specifically, a belief that justice and due process require that the decisions in these cases be affirmed.

Since its founding in 1920, the American Civil Liberties Union has sought to prevent and to redress violations of civil liberties protected by the Constitution through litiga-

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* Consent has been granted by Respondent in No. 413 and Petitioner in No. 418. Petitioner in No. 413 and Respondent in No. 418 did not reply to Amici's request.

tion, educational programs, public statements and petitions to the Government. Its intention has never been to further the interest of any special group, but rather to defend the civil liberties of all persons equally. The American Civil Liberties Union hopes that an argument presented by an organization both experienced and specially concerned with maintaining constitutionally guaranteed liberties may be of aid to the Court in its adjudication of the sensitive issues raised by these cases.

Amici move for leave to file this brief for two specific reasons:

a. The harm resulting to respondents and to other successful criminal appellants from the harsher sentencing practices condemned by the courts below warrants the fullest possible exposition of the serious constitutional issues involved.

b. The currency of harsher sentencing practices not yet specifically condemned by any particular decision from this Court produces a critical constraint on basic civil liberties requiring uniform protection in the decision of this Court in light of comprehensive consideration of the constitutional issues raised.

We believe our brief will aid the Court by emphasizing these aspects of the litigation and especially by bringing to bear certain developments so recent and unreported as not necessarily to have been found by the parties. If our arguments were accepted, they would be dispositive of both cases.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movants

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NORTH CAROLINA CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of the *Amici*

We respectfully refer the Court to the preceding motion for leave to file this brief wherein the interest of *amici curiae* is set forth.

Question Presented

Does Subjecting A Successful Criminal Appellant to the Risk of Harsher Punishment and the Risk of Loss of Time Already Served, As a Condition of Securing Him the Opportunity for a Fundamentally Fair Trial, Violate the Due Process Clause of the Fourteenth Amendment?

Statement of the Cases

I. *Simpson* v. *Rice.*

In February, 1962, William Rice, an indigent without benefit of counsel, was convicted of four counts of second degree burglary in Pike County Circuit Court, Alabama. On the first count, he was sentenced to four years. On each of the other three, he was sentenced to two years. The sentences were imposed to run consecutively. Thus, had Rice served these sentences pursuant to a state criminal proceeding in which the state had enjoyed a full opportunity to secure an adequate determination of his punishment but in which he had been denied due process of law, he would have served no more than ten years in prison.

After serving more than two-and-one-half years, however, Mr. Rice successfully sought a new trial pursuant to this Court's decisions in *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Doughty* v. *Maxwell,* 376 U. S. 202 (1964); and *Pickelsimer* v. *Wainwright,* 375 U. S. 2 (1963). At the second trial, the state abandoned one of the four counts and succeeded again in convicting Mr. Rice only of the other three counts. The trial was held before the same judge who originally heard the case. Although nothing developed in the course of the second trial which the state

subsequently could point to by way of explanation, the trial judge denied Mr. Rice all credit for his two-and-one-half years of penitentiary service and then proceeded to impose consecutive sentences of ten, ten, and five years for the three counts of second degree burglary! Thus, the net effect of Rice's successful effort to secure a new trial consistent with due process was to lose all benefit of his prior service and to be recommitted to prison for twenty-five years where, by having done nothing, he could not have been made to serve more than seven-and-one-half years. His punishment, though on fewer counts and a record yielding no new information respecting matters previously unknown to the same judge who originally sentenced him, had been more than trebled.

On Rice's application for a writ of habeas corpus to the federal district court for the Middle District of Alabama, Judge Frank Johnson held that the denial of credit constituted a denial of due process and that the imposition of harsher sentences without "reasons . . . affirmatively appear (ing in the) record," violated the due process and equal protection clauses of the fourteenth amendment. *Rice* v. *Simpson,* 274 F. Supp. 116, 121 (M. D. Ala. 1967). On appeal, the Court of Appeals for the Fifth Circuit affirmed 396 F. 2d 499 (1968), after which this Court granted the State's Petition for Certiorari.

II. *North Carolina* v. *Pearce.*

In May, 1961, Clifton Pearce, an indigent, was convicted of assault with intent to commit rape, in the Superior Court of Durham County, North Carolina, and sentenced from twelve to fifteen years. After serving nearly six-and-one-half flat and gain time of that sentence, Pearce secured a

new trial on the basis that the admission into evidence of inculpatory statements secured by a police officer during a four month period while Pearce was in custody but without counsel operated to deprive him of his liberty without due process under the State and federal constitutions. *State* v. *Pearce,* 266 N. C. 234, 145 S. E. 2d 918 (1966). On retrial for the same offense, Pearce was again convicted. Although "the evidence on the new trial was not essentially different" from "the evidence adduced at the trial in 1961," (*State* v. *Pearce,* 151 S. E. 2d 571 (N. C. 1966)) Pearce was sentenced more severely to eight years with service commencing on February 6, 1967. The harsher net effect was twofold. First, by having raised the constitutional issue rather than remaining passively in prison under a conviction which violated his constitutional rights, Pearce was made to forfeit his parole eligibility. At the time he applied for a new trial, he was already eligible for parole; under the subsequently imposed harsher sentence, he would not become eligible for parole for an additional two years. (In North Carolina, a prisoner is eligible for parole consideration after serving one-fourth of his sentence. N. C. G. S. §148-58.) Second, the date for his outright release was extended by a minimum two years and eleven months. See Petitioner's Brief, notes 1 and 2.

On November 20, 1967, the federal district court for the eastern district of North Carolina entered an Order in response to Pearce's petition for a writ of habeas corpus holding that the harsher sentence violated the due process and equal protection clauses of the fourteenth amendment, and providing the State with ample opportunity to secure a new sentence consonant with the original sentence. No appeal was taken by the state from this order. Upon

refusal of the state superior court to resentence Pearce, the district court ordered his release. Its decision was affirmed per curiam by the Court of Appeals for the Fourth Circuit, 397 F. 2d 253 (1968), after which this Court granted the state's petition for certiorari.

Both cases are characterized by the following factual elements:

1. In both cases, the State enjoyed an error-free opportunity at the conclusion of the first trial to secure an adequate sentence.

2. In neither case is there evidence in the record or explanation by the State to account for the harsher sentences following retrial. Neither case yields even the slightest basis for overcoming whatever presumption of regularity might attach to the sentencing imposed at the conclusion of the first trial.

3. In both cases, the sole error committed in the course of the first trial was prejudicial to the accused and did not at all affect the opportunity of the state to secure a fair and adequate sentence.

4. In both cases, the magnitude of error against the accused was of constitutional proportions which operated to deprive him of his liberty without due process.

5. In both states, post-conviction conduct of convicted defendants is properly subject to consideration by the Board of Paroles in the appropriate exercise of its discretion.

6. In both states, the risk that a defendant's total active sentence may be extended even beyond the term im-

posed at the conclusion of his first trial is imposed solely upon successful appellants.

7. In neither state is the forfeiture of sentence for successful appellants alone expressly approved by the legislature. Nor are there legislative studies or any other studies or evidence of any kind whatever which would suggest that the public safety would be less secure if successful appellants were given the same protection against harsher sentences as all other defendants.

ARGUMENT

To Subject an Accused to the Risk of Harsher Punishment or Loss of Time Already Served Solely as a Condition of Appeal Essential to Secure His Constitutional Right to a Fair Trial, Is an Unconstitutional Condition Which Violates the Due Process Clauses of the Fifth and Fourteenth Amendments.

We respectfully submit that the crux of the constitutional issues in these harsher resentencing cases was correctly recognized two years ago by Judge Sobeloff, in *Patton* v. *North Carolina*, 381 F. 2d 636, 640 (4th Cir. 1967), *cert. denied*, 390 U. S. 905 (1968). In essence, all of the arguments and all of the several converging constitutional considerations boil down to this:

> [A State imposing the risk of harsher punishment on a successful criminal appellant] deprives the accused of the constitutional right to a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence. It may not exact this price. En-

joyment of a benefit or protection provided by law cannot be conditioned upon the "waiver" of a constitutional right.

Judge Sobeloff's full opinion seems to us sufficiently important to a correct determination of the issues now before this Court that we have felt it appropriate to append a copy to this brief in lieu of more elaborately developing arguments and authorities than necessary under the circumstances. Indeed, we extend this brief as far as we do only by way of clarification of points the misapprehension of which may have contributed to the recent opinion of Judge Friendly in *United States* v. *Coke*, No. 529, decided November 27, 1968 (unreported), a case in which the Court of Appeals for the Second Circuit rejected arguments respecting the unconstitutionality of harsher sentencing even while almost entirely forbidding the practice itself pursuant to its supervisory authority. Between those two cases and the clarifications corrective of *Coke* submitted in this brief, we believe the unconstitutionality of imposing the risk of harsher sentences upon successful criminal appellants will readily be determined by this Court.

In the two pending cases, *Pearce* and *Rice*, as in every other case where the problem currently before this Court is posed, the prosecution has enjoyed a full and fair opportunity to bring to the attention of the judge or jury all matters appropriately bearing on the punishment of the accused. To the extent that developments subsequent to trial and conviction may also bear upon the time when the accused should be released from custody, the government here, as in every other case, is free to have such matters considered by the parole board (or, as in some states,

by an adult sentencing authority). In the unlikely event that some prior offense escaped the notice of the court when the accused was under consideration for sentencing, moreover, the government is free to bring a separate proceeding under its habitual offender (recidivism) acts. To the little extent that states may be concerned that sentences generally tend to be imposed in some instances without due consideration of the nature of the offense or the character of the accused, moreover, each state is constitutionally free to make ample provision for staffing and presentence reports to guard against unduly lenient sentencing to whatever extent that government feels to be appropriate. Indeed, each state presumably has done this to the precise extent that it has been genuinely concerned with the securing of sentences which are both fair to the accused and adequate for the public safety.

We emphasize these matters at the outset for two reasons. First, to settle the fact that there are ample avenues open to government to secure the fair punishment of all who are guilty of breaking its laws, without recourse to capricious devices applicable solely to those whom government deprived of their freedom in an error-ridden trial. Second, to settle the fact that recognition of the due process right of an accused not to be subjected to the risk of harsher punishment as a condition of securing a fundamentally fair trial would in no respect whatever give him a "sentence advantage" over others convicted of crime.

Since these things are true, it becomes quite impossible to understand any basis on which a state can assert a compelling interest in threatening to obliterate the credit one has acquired while serving his sentence and threatening even to impose a harsher sentence should that person rely

upon the decisions of this Court by insisting upon his right to a fundamentally fair trial.

In neither of the cases at hand did the accused seek to be free of a second trial; rather, he seeks to be free only from hazards not imposed on those content to wait out their time in prison whether or not they were fairly convicted, too fearful of a harsher sentence following a second trial even to murmur a complaint. Since the accused does not seek to avoid a fair trial, moreover, early decisions by this Court in which the issue was solely whether a successful criminal appellant could be retried following appeal are obviously not applicable. See, *e.g.*, *Stroud* v. *United States*, 251 U. S. 15 *rehearing denied*, 251 U. S. 380 (1920); *Robinson* v. *United States*, 144 F. 2d 392 (6th Cir. 1944), *aff'd*, 324 U. S. 282 (1945); *Murphy* v. *Massachusetts*, 177 U. S. 155 (1900). As Judge Sobeloff observed of *Stroud*:

> Stroud thus stands for no more than the well-established proposition that the double jeopardy clause does not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution. *Patton* v. *North Carolina*, 381 F. 2d at 644-45.

While it is impossible to locate a rationale for a state's failure to give repose to sentences only of those originally denied a fair trial, it is virtually self-evident how the risk of harsher sentencing must necessarily affect the opportunity of an accused to secure a fair trial. The point is well observed in the A. B. A. Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies 95-96 (Ten. Dr. 1967), recently approved by the A. B. A. House of Delegates, to forbid harsher sentencing on retrial under any circumstances:

> Care should be taken to prevent the imposition of more harsh sentences, or the implicit threat of the possibility, from deterring applicants with meritorious claims from presenting them for vindication. There is some evidence that this repressive attitude exists today. "The only hope for straightening things out is to give some 'Gideonite' a new trial and reconvict him," said a clerk of court in Escambia County, Florida. "If we give him a heavier sentence than he got the first time, maybe that will serve as a lesson to the others." Time Magazine, Oct. 18, 1963, p. 53. A trial judge in Delaware County, Pennsylvania, denying a defendant credit for over three years of time already served under an invalidated sentence, said: "This is the risk these prisoners take when they seek to take advantage of new legal interpretations." Delaware County (Pa.) Daily Times, March 24, 1965, §2, p. 1.
>
> A North Carolina defendant, originally convicted without counsel and sentenced to two years in prison, successfully challenged that judgment; following conviction again, he was sentenced to ten years and denied credit for time previously served. See State v. Williams, 261 N. C. 172, 134 S. E. 2d 163.

Again, as Judge Sobeloff noted in *Patton*:

> That this is a very real risk and not merely hypothetical is indicated by an informal survey conducted by the Duke Law Journal which revealed that in 72% of the retrials occasioned by the denial of counsel at the first trial, credit for time already served was effectively denied. Note, Increased Sentence and Denial of Credit on Retrial Sustained Under Traditional

Waiver Theory, 1965 Duke L. J. 395, 399 n. 25. 381 F. 2d at 639.

And the *in terrorem* effects of this risk have been attested most poignantly by one who was acquitted on retrial but who indicated that he would not even have sought a new trial had he then known of the risk. Thus, a prisoner having successfully applied for a Writ of Habeas Corpus to Judge Craven (who initially decided the *Patton* case) wrote the Judge shortly thereafter:

> Dear Sir:
>
> I am in the Meckelnburg County jail. Mr. ..... chose to re-try me as I knew he would.
>
> • • •
>
> Sir the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and now I am to be tried again and with all probility I will receive a heavier sentence then before as you know sir my sentence at the first trile was 20 to 30 years. I know it is usuaelly the courts prosedure to give a larger sentence when a new trile is granted. I guess this is to discourage Petitioners. Your Honor, I know you have tried to help me and God knows I appreceate this but please sir don't let the state re-try me if there is any way you can prevent it. *Patton* v. *North Carolina,* 256 F. Supp. 225 (W. D. N. C. 1966).

Thus, the A. B. A. Draft Standards provide:

> §6.3 Sentence on re-prosecution of successful applicants: credit for time served.
>
> (a) Where prosecution is initiated or resumed against an applicant who has successfully sought post-

conviction relief and a conviction is obtained, or where a sentence has been set aside as the result of a successful application for post-conviction relief and the defendant is to be resentenced, the sentencing court should not be empowered to impose a more severe penalty than that originally imposed.

(b) Credit should be given towards service of the minimum and maximum term of any new prison sentence for time served under a sentence which has been successfully challenged in a post-conviction proceeding.

This recommendation, incidentally, merely brings our own standards into line with England where "upon reconviction the accused may not be given a sentence of greater severity than that imposed at the original trial, and the new sentence is dated back to the commencement of the former sentence, excluding any time spent on bail meanwhile." Samuels, *Criminal Appeal Act,* 1964, 27 MODERN L. REV. 568, 572 (1964). Similarly, it would merely bring our civilian standards into line with treatment of our own military where harsher resentencing and the denial of credit are also forbidden. Uniform Code of Military Justice, Art. 63(b), 60 Stat. 127, 50 U. S. C. A. §650(b) (1951). For that matter, it would bring us abreast of the Germans who also forbid harsher resentencing. German Code of Criminal Procedure §331 (para. 1) and §358 (para. 2).

Recognition of the intrinsic unfairness of harsher resentencing and its unessentiality to orderly government has mounted rapidly among a growing number of federal and state courts with occasion to consider the problem during the past three years. Thus, as already noted, the Court of

Appeals for the Fourth Circuit has prohibited harsher sentencing upon retrial of a successful criminal appellant for the same offense, on constitutional grounds. *Patton* v. *State of North Carolina,* 381 F. 2d 636 (4th Cir. 1967), *cert. denied,* 390 U. S. 905 (1968). The Court of Appeals for the First Circuit has prohibited harsher sentencing in the exercise of its supervisory authority over the district courts, except where the record of the second trial discloses information in a presentence report not available to the first judge. *United States* v. *Marano,* 374 F. 2d 583 (1st Cir. 1967). The Court of Appeals for the Second Circuit, while not accepting the constitutional persuasion, nonetheless has outlawed harsher sentencing in the exercise of its supervisory authority except where the record of the second trial discloses evidence in aggravation of the offense and a specification of reasons by the judge. *United States* v. *Coke,* No. 529, Sept. Term, 1967, Decided Nov. 27, 1968 (not yet reported). The Fifth Circuit's position is partly reflected in *Rice* v. *Simpson.* In addition, Judge Thornberry of the Fifth Circuit recently observed:

> In my judgment, *Patton* v. *North Carolina,* 4th Cir. 1967, 381 F. 2d 636, cert. denied, 1968, 88 S. Ct. 818, presents unanswerable constitutional objections to an increased sentence or denial of credit for time served on retrial where the original conviction has been set aside on collateral attack because of constitutional errors. *State of Texas, et al.* v. *Grundstrom,* No. 25423, at p. 13, decided Oct. 25, 1968 (not yet reported).

The Ninth Circuit appears similarly to have forbidden harsher sentencing in the lower federal courts, although the precise technical grounds are not clear. *Walsh* v. *United*

States, 374 F. 2d 421 (9th Cir. 1967). Similarly, the highest courts of California, Oregon, New Jersey, Michigan, Minnesota, Wisconsin, have either entirely (*e.g.*, California) or substantially (*e.g.*, Michigan) outlawed harsher sentencing, all within the past three years. See, *e.g.*, *People* v. *Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963); *People* v. *Ali*, 57 Cal. Rptr. 348 (1967); *State* v. *Turner*, 429 P. 2d 965 (Ore., 1967); *State* v. *Wolf*, 46 N. J. 301, 216 Atl. 2d 586 (1966); *Moore* v. *Buchko*, 154 N. W. 2d 437 (Mich. 1967); *State* v. *Leonard*, 159 N. W. 2d 577 (Wis. S. Ct., June 28, 1968). And for an apparently similar position in Arkansas, see *Rush* v. *State*, 395 S. W. 2d 3 (Ark. S. Ct. 1965).

It is true, of course, that not all of the courts have moved in this direction. Three federal circuit courts, in opinions antedating *Patton*, upheld harsher sentences in fairly broad terms. See *United States* v. *White*, 382 F. 2d 445 (7th Cir. 1967); *Newman* v. *Rodriquez*, 375 F. 2d 712 (10th Cir. 1967); *Starner* v. *Russell*, 378 F. 2d 808 (3rd Cir.) *cert. denied*, 88 S. Ct. 166 (1967). It is respectfully submitted, however, that a fundamental rule does issue from the due process clauses of the fifth and fourteenth amendments altogether to bar all state and federal courts from conditioning the right of an accused to a fundamentally fair trial upon the risk of harsher sentencing, especially as the risk is borne only by a group identified by a characteristic having no relevance to any governmental objective in the reconsideration of a sentence, where the risk is inessential to any appropriate governmental purpose, and where it results in the unnecessary chilling of constitutional rights.

There are, specifically, three related constitutional rights which the risks of harsher sentencing unreasonably constrict and abridge. There is, first of all, the due process right to a

fundamentally fair trial which, in every case where the defendant has appealed successfully on the basis of a *constitutional* defect in his first trial, has—by definition—initially been denied. As the coerced price of asserting that right, the accused is threatened with a risk of harsher treatment that he could avoid only by giving up his right to fair trial.

Second, while "this Court has never held that the States are required to establish avenues of appellate review, . . . it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966). Moreover, while the Court has declined to find a constitutional right to appeal as such (*McKane* v. *Durston*, 153 U. S. 684 (1894) (dicta)), it has implied that failure of a state to provide any adequate postconviction means of testing substantial federal questions may constitute a denial of due process. See *Young* v. *Ragen*, 337 U. S. 235, 236-39 (1949); *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688, 689, 692 (1943); *Mooney* v. *Holohan*, 294 U. S. 103, 110-13 (1935); *Moore* v. *Dempsey*, 261 U. S. 86, 90-91 (1923); *Smith* v. *Bennett*, 365 U. S. 708, 713 (1961). Surely no postconviction remedy is "adequate" if its availability is conditioned upon the compulsory forfeiture of time already served in prison and whatever protection would otherwise be provided by one's original sentence. Assuming that a state need not provide for appeals, however, still it must observe fundamental fairness as a requirement of due process when it elects to do so:

> One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from

> going there unless by means consonant with due process of law. *Homer* v. *Richmond*, 292 F. 2d 719, 722 (D. C. Cir. 1961).

See also *Slochower* v. *Board of Education*, 350 U. S. 551, 555 (1956):

> To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities.

Finally, we may note the necessary involvement of a companion constitutional right, namely the right secured in Article I, Section 9 of the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The "Privilege of the Writ" was originally secured by the Judiciary Act of 1789, and carries into the federal courts today through 28 U. S. C. §2255. The availability of the writ in federal courts to test the legality of custody of state prisoners were established by Congress in 1866, and carries through today in 28 U. S. C. §2241(c). The availability of the writ is constricted and abridged, however, exactly to the extent that unreasonable conditions are placed upon it; without doubt, the practice of a state to subject one successfully applying for a writ of habeas corpus to the risk of harsher treatment following retrial effectively abridges its availability. Yet, this Court declared:

> [T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. *Ex parte Hull*, 312 U. S. 546, 549 (1941).

It is, moreover, entirely reasonable to conclude that state restriction of the writ, by subjecting petitioners to the risk of harsher sentencing, is incompatible with 28 U. S. C. §§2255 and 2241(c) themselves and must give way under the supremacy clause in Article VI of the Constitution.

The manifest unfairness of saddling successful appellants with the risk of harsher sentencing is clear from recent and prior utterances by this Court. In *United States* v. *Ewell*, Mr. Justice Fortas observed:

> In a different setting this Court has vividly criticized the Government's attempt to penalize a successful appellant by retrying him on an aggravated basis. *Green* v. *United States*, 355 U. S. 184. Although the decision in *Green* was premised upon the Double Jeopardy Clause, its teaching has another dimension. *Green* also demonstrates this Court's concern to protect the right of appeal in criminal cases. It teaches that the Government, in its role as prosecutor, may not attach to the exercise of the right of appeal the penalty that if the appellant succeeds, he may be retried on another and more serious charge. MR. JUSTICE BLACK: speaking for the Court in *Green*, said: "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 383 U. S. 116, 127-28 (1966) (dissenting opinion).

Concurring in the same case, Mr. Justice Brennan noted that he would have joined the dissent but that the facts indicated the defendants in *Ewell* could not be adjudged more harshly following their successful appeals. *Id.* at 125-26.

These opinions, we respectfully submit, correctly catch the spirit of the decisions by this Court in *Green* v. *United*

States, 355 U. S. 184 (1957), and *Fay* v. *Noia,* 372 U. S. 391 (1963). *Green* emphasized exclusively the agony of the accused in facing the risk of harsher treatment (there, the risk of reprosecution for a higher offense) as an unwarranted discouragement to secure a hearing on the constitutionality of his original conviction. While the Court distinguished the harsher sentencing case at the time in a footnote, 355 U. S. at 195 n. 14, Mr. Justice Frankfurter was surely correct in observing:

> As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment. *Id.* at 213 (dissenting opinion).

Precisely on this basis, Judge Sobeloff concluded as he did in *Patton,* that the imposed risk of harsher sentencing denied the accused due process of law. 381 F. 2d 636, 638-641 (4th Cir. 1967), *cert. denied,* 390 U. S. 905 (1968). See also *Hetenyi* v. *Wilkins,* 348 F. 2d 844, 859 (2d Cir. 1965), *cert. denied,* 383 U. S. 913 (1966); *People* v. *Henderson,* 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963); Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 YALE L. J. 606, 628-636 (1965).

The due process voiding of unreasonable conditions on the right to a fair trial is not, of course, a recent phenomenon. It dates at least from Mr. Justice Sutherland's opinion for the Court in *Frost & Frost Trucking Co.* v. *Railroad Comm'n,* 271 U. S. 583, 594 (1926), and has been uniformly applied in a vast variety of cases. See cases and materials

cited in Comment, *Another Look at Unconstitutional Conditions,* 117 U. PA. L. REV. 144 *passim,* esp. earlier discussions at note 1. It has been most recently applied by this Court in *United States* v. *Jackson,* 390 U. S. 570 (1968).

We believe, respectfully, that the only meaningful question open to consideration by this Court relates solely to the breadth of the constitutional prohibition against harsher resentencing. Here, too, however, we believe that Judge Sobeloff formulated the rule in a manner most conducive to fundamental fairness, most susceptible of uniform application with a minimum of administrative difficulty, and least susceptible of subliminal manipulation, when he observed (381 F. 2d at 641):

> An analogy may be drawn between the solution adopted by the Supreme Court in Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), in response to the problems raised by Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), and the issue here. The Court had earlier held in Betts that whether the conviction of an unrepresented defendant has a denial of due process depended upon whether "special circumstances" existed which would, in a particular case, "constitute a denial of fundamental fairness." 316 U. S. at 462, 62 S. Ct. at 1256. But in *Gideon,* there was forthright recognition that to require such a showing, in an area in which the chance of undetectable prejudice is so great, was too heavy a burden to place upon an accused. The controlling point was not that the absence of counsel necessarily prejudiced the defendant, but that it created the *opportunity* for unfairness. For this reason, the *Gideon* Court made the presumption of injury irrebutable.

> Similarly, improper motivation is characteristically a force of low visibility. In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old.

We may observe in this case that the need for a prophylactic prohibition of harsher sentencing upon retrial is even more acute, since the possibility of undetectable prejudice would otherwise operate to recreate the very chilling effect upon the accused's ability to seek a fair trial which the rule is meant to alleviate. Moreover, the Court's more sensible preventive formulation in *Gideon* has been followed in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and no reason for a different or more restricted constitutional formulation presents itself in this case.

CONCLUSION

For the reasons noted above and further adduced in the appended Opinion in *Patton* v. *North Carolina*, 381 F. 2d 636 (4th Cir. 1967), *cert. denied*, 390 U. S. 905 (1968), we respectfully urge that the decisions below be affirmed.

Respectfully submitted,

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